Supreme Court, U.S.
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No. 04 461

In The

Supreme Court of the United States

ANTHONY TROY BODDEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Florida's implied consent laws, as applied to petitioner Bodden, failed to provide him with "an approved urine test" under Florida's Administrative Procedures Act in violation of the Equal Protection Clause contained in section #1 of the 14th Amendment to the United States Constitution?

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OPINION BELOW

The Florida Supreme Court's opinion has been reported in the Southern Second Reporter at 877 So.2d 680 (Fla. 2004) The Second District Court of Appeals decision has been reported at 872 So.2d 916 (2nd DCA 2002).

JURISDICTION

The Florida Supreme Court rendered its opinion on April 15, 2004, and entered an order denying Petitioner's motion for rehearing on July 6, 2004. This Court has jurisdiction under the Equal Protection Clause contained in Section 1 of the 14th Amendment, United States Constitution to review the Florida Supreme Court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

14th Amendment, Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

The Petitioner was arrested for DUI and was requested by law enforcement to submit to a breath test to determine the alcoholic content of his breath and to a urine test to detect the presence of controlled substances. (App. 2).

The Petitioner submitted to an "approved" breath test and an "unapproved" urine test after having been given an implied consent warning misinforming the Petitioner that both tests he was submitting to were "approved". (App. 2, 3). His breath test result was 0.06, below the legal limit. (App. 2). His urine results tested positive for the presence of marijuana. (App. 2). He moved to exclude the urine test results for violation of Florida's Administrative Procedures Act because the procedure employed for collection, transportation, storage, and analysis had not been "approved" in accord with Florida's Administrative Procedures Act and for violation of his equal protection rights as guaranteed by the Federal Constitution because the urine test was not "approved". (App. 2, 20). The trial court granted the motion finding that the Petitioner should have been given an "approved" urine test in accord with Florida's Administrative Procedures Act. (App. 3, 19, 25).

In the trial court, the Petitioner and Respondent agreed to the admissibility of a deposition of Mr. Dale Livingston, a chemical analyst with FDLE (the Florida Department of Law Enforcement), and that the testimony of the analyst in this case would be the same as Mr. Livingston's which originated from a different case/ different defendant. (App. 3, 20, 21). Mr. Livingston developed procedures for the testing for the presence of controlled substances in urine samples that is used by all

the analysts throughout the State of Florida. (App. 21). His procedures were never promulgated in accord with Florida Statute 120.50 et seq. (The Florida Administrative Procedures Act). (App. 21). In fact, there are no "approved urine tests" in the state of Florida in accord with Florida Statute 316.1932 (non commercial driver implied consent law) or Florida Statute 322.63 (commercial driver implied consent law). (App. 21).

The petitioner made two challenges in the trial court to the admissibility of his urine test results. First, that Florida Statute 316.1932 requires that the "urine test" be approved (similar to breath tests and blood tests) in accord with Florida's Administrative Procedures Act and the State's failure to provide the Petitioner with such a test requires exclusion of the results. (App. 3, 20). Second, that providing other persons with approved breath tests or approved blood tests violates the Equal Protection Clause of the Federal Constitution because those persons are receiving enhanced protection that the petitioner did not since his urine test was not approved. (App. 15). The trial court granted the petitioner's motion finding that Florida Statute 316.1932 did require the urine test to be approved. (App. 3, 19). The trial court never addressed the petitioner's Equal Protection argument.

The Second District Court affirmed the trial court's decision, finding that Florida Statute 316.1932 requires the urine test to be approved. (App. 20-24). The petitioner's counsel also argued to the Second District, as he had done in the trial court, that in the alternative, the failure to provide the petitioner with an approved urine test violated the Equal Protection Clause of the Federal Constitution and as such required exclusion. The Second District never had to address that argument because it

agreed with the petitioner on the interpretation of Florida Statute 316.1932 requiring an approved urine test.

The Florida Supreme Court reversed the Second District. (App. 2, 17, 18). It interpreted Florida Statute 316.1932 and determined that it did not require an approved test for urine samples. (App. 17). The Florida Supreme Court also addressed petitioner's alternative argument regarding the violation of The Equal Protection Clause. (App. 15). The Florida Supreme Court found no constitutional violation but in doing so applied the wrong standard. (App. 15-17). Therefore, the petitioner has brought this petition on the basis that the Florida Supreme Court's misapplication of law as related to an Equal Protection analysis was erroneous.

REASONS FOR GRANTING THE PETITION

ISSUE – Whether failure to provide Petitioner Bodden with an "approved urine test" under Florida's Administrative Procedures Act after misadvising him that he was being offered one, violates the Equal Protection Clause contained in section #1 of the 14th Amendment to the United State's Constitution?

The 14th Amendment to the Federal Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

> liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*". (emphasis added)
>
> 14th Amendment, Federal Constitution.

Under the Equal Protection Clause of the Federal Constitution, a defendant charged with violating Florida's DUI Statute by impairment of controlled substances which is proven with a urine test as evidence is entitled to the same "protection under the law" as a defendant charged with violating the same statute where the evidence of impairment or unlawful alcohol level is based on an "approved" breath test or an "approved" blood test. "Same protection under the law" means that if defendants charged with DUI with breath or blood evidence get an "approved test", then defendants charged with DUI by controlled substance must also get an "approved urine test".

Therefore, the Petitioner was entitled to equal protection under the law and if the law requires breath and blood tests to be "approved", then the law must also require urine tests to also be "approved". To say otherwise would entitle a class of defendants to greater protection under the law and be violative of the equal protection clause.

The Supreme Court of Florida rejected the Petitioner's Equal Protection argument. (App. 15-17). In doing so, it applied the wrong legal standard. The Florida Supreme Court applied the rational basis test as its standard. (App. 17). The appropriate standard is the heightened level of scrutiny of compelling state interest.

The standard applicable for "interstate right to travel" is compelling state interest, not rationale basis. *Wardell v.*

Board of Education, of City School District, 529 F.2d 625 (Ohio 1976), *Andre v. Board of Trustee's of Village of Maywood*, 561 F.2d 48 (7th Cir. 1977). Equal protection challenges only apply to interstate travel, not intrastate. *Wardell v. Board of Education, of City School District*, 529 F.2d 625 (Ohio 1976), *Andre v. Board of Trustee's of Village of Maywood*, 561 F.2d 48 (7th Cir. 1977). Affectation to the petitioner's driving privilege interferes with his right to travel interstate, therefore, the petitioner can challenge Florida's implied consent laws on Equal Protection grounds.

This case involves the petitioner's right to travel interstate because his driving privileges are subject to suspension if convicted of DUI. Upon conviction, the petitioner's driving privilege will be suspended. Florida is a member of the driver license compact. Florida Statute 322.43 (1991) & Florida Statute 322.44 (1991). The driver license compact is an act that states a driver's license suspension in one state will be recognized in all others. Florida Statute 322.43 (1991) & Florida Statute 322.44 (1991). Therefore, if the petitioner's right to drive is suspended in Florida, then his right to drive anywhere in the United States is also suspended. Consequently, his right to interstate travel is affected. The right to interstate travel is a fundamental right, therefore requiring heightened scrutiny. *Kreitzer v. Puerto Rico Cars*, 417 F. Supp. 498 (DC Puerto Rico 1976).

Additionally, a private interest in a driver's license is a substantial one. *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979). Therefore, this court should apply a heightened level of scrutiny (not a rationale basis standard). By applying the correct standard, there is no compelling state interest justifying a failure to provide non

commercial drivers with "approved" urine tests when every other test is "approved" under Florida law.

A. Florida's two (2) implied consent laws

The State of Florida has two implied consent statute's. Florida Statute 316.1932 relates to non-commercial drivers and Florida Statute 322.63 relates to commercial drivers. In accord with both implied consent statutes, Florida has "approved" breath tests and "approved" blood tests that have been formally promulgated under Florida's Administrative Procedures Act (120.54 F.S.). Florida's implied consent law (316.1932) approves breath tests and blood tests for non-commercial drivers. Florida's implied consent law (322.63) approves breath, blood, and urine tests for commercial drivers. The only person who does not receive an "approved" test is non commercial drivers who submit to a urine test. This statutory scheme is clearly unconstitutional.

B. Florida Statute 316.1932 requires that defendants submit to approved breath and blood tests

Florida Statute 316.1932 requires that the Florida Department of Law Enforcement adopt procedures for "approved breath and blood tests" in accord with the Administrative Procedures Act, Florida Statute Chapter 120.50 et al.

C. Florida Statute 322.63 requires that defendants submit to approved breath, blood, and urine tests

Florida Statute 322.63 is the implied consent law for commercial drivers. Florida Statute 322.63(1) states in pertinent part:

> A person who accepts the privilege extended by the laws of this state of operating a commercial motor vehicle within this state, be deemed to have given his or her consent to submit to **an approved chemical or physical test of his or her blood, breath, or urine** . . . for the purpose of detecting the presence of chemical substances . . . or of controlled substances. (emphasis added).

Additionally, Florida Statute 322.63(3)(a) states in pertinent part:

> The physical and chemical tests authorized in this section shall be administered substantially in accordance with **rules adopted by The Florida Department of Law Enforcement**. (emphasis added).

While the Respondent has argued throughout that no authority exists for FDLE to promulgate rules for an approved urine test, this argument is clearly erroneous in light of Florida Statue 322.63. The plain language of Florida Statute 322.63 requires an approved urine test, thereby rendering the Respondent's argument invalid.

FDLE is in violation of Florida Statute 322.63 because the required urine test for commercial drivers has not yet been approved in accord with the Florida Administrative Procedures Act under Florida Statute 120.54. Nevertheless, Florida Statute 322.63 still requires an "approved" urine test for commercial drivers.

If commercial drivers are entitled to an approved urine test, then the rights of non-commercial drivers **must** be co-extensive. If commercial and non commercial drivers all get "approved" breath and blood tests, then the rights of non-commercial drivers who submit to urine tests must be co-extensive. To have equal protection under the law, every driver must have the same entitlements and protection under Florida law as well as the Federal Constitution. Therefore, the Petitioner was entitled to "an approved" urine test.

D. What does it mean to be an "approved test" in Florida?

Florida Statutes 316.1932 and 322.63 require that every person who accepts the privilege to drive in Florida must submit to an "approved" test. Florida Statute 316.1932 (1991) & Florida Statute 322.63 (1991).

Florida Statutes 316.1932 and 322.63 does not require persons to submit to "any test", rather the specific language of the statute uses the term "approved". Florida Statute 316.1932 (1991) & Florida Statute 322.63 (1991). The term "approved" has special meaning. An "approved test" as contemplated by the implied consent laws (316.1932 F.S.& 322.63 F.S.) is a test that has been set up (or established) in accord with the applicable administrative provisions; drivers are not required under Florida Statute 316.1932 or 322.63 to submit to "any test", rather only an "approved test". *State v. Polak*, 598 So.2d 150 (1st DCA 1992), *State v. Flood*, 523 So.2d 1180 (5th DCA 1988).

E. Lack of sufficiency of the administrative rules

The Florida Department of Law Enforcement has adopted very specific guidelines regarding what is an "approved breath test" and what is an "approved blood test" for Statutes 316.1932 & 322.63. FDLE has failed to take the same measures regarding urine. In fact, there is no urine test that has been subject to the formal promulgation process in compliance with the administrative procedures act. (App. 3).

The Respondent argued that Florida Statutes do not require an approved test and that there is no delegation authorizing FDLE to promulgate such rules. **This is incorrect**. (Emphasis added). See Florida Statute 322.63(1) and 322.63(3)(a).

F. The Administrative Procedures Act, Florida Statute 120.50, et seq.

Administrative agencies, like the Florida Department of Law Enforcement, are required to follow the promulgation procedure requirements as spelled out in chapter 120 of the Florida Statutes when adopting rules. The act provides a framework for administrative agency action and contains detailed provisions governing the promulgation of agency rules. It calls for publication of the proposed rule, followed by a public hearing, then submission of written comments, and finally an opportunity to make any required changes prior to submitting the final proposed rule to the Governor's office for his review and final approval. In essence, the promulgation process is the opportunity for the citizenry of Florida (especially experts) to give the testing procedure a thumbs up or down and to make the required changes so that the procedure ensures

reliability. It is the citizenry's opportunity for due process. It ensures that only reliable evidence will be used in criminal trials.

In *Reisner*, the Fifth DCA stated:

> One intent of the purpose for specifying the method and means for such chemical tests is to ensure that only reliable scientific evidence is used in court proceedings to protect rights of Defendants facing the repercussions of statutory presumptions in their criminal trials. HRS must approve and specify the specific technology and methods for ensuring the accuracy of the machines used. It must do so by formally promulgating rules.

State v. Reisner, 584 So.2d 141 (5th DCA 1991)

Section 120.52(16) defines a "rule" as an:

> **Agency statement of general applicability that implements**, interprets, or prescribes laws or **policy** or **describes the organization, procedure or practice requirements of an agency and includes any form** which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.(Emphasis added)

At the time of the Petitioner's urine test, there was no rule in place that had been subject to the promulgation process under chapter 120.50 et seq. detailing how urine samples should be tested. (App. 21). Rather, FDLE, through Mr. Dale Livingston, developed and used a process of testing urine samples that had never been subjected to the Administrative procedures act. (App. 2). This testing procedure that Mr. Livingston employed should have been

promulgated because it clearly falls within the definition of a "rule" and FDLE's failure to properly promulgate the procedure constituted an invalid delegation of legislative authority.

The testing procedure that Mr. Livingston employed for testing urine samples, implemented policy and procedure requirements, and imposed requirements for the testing of urine samples that was not required by another statute or existing rule. Mr. Livingston established a procedure for testing urine to determine the presence of many different types of substances that every analyst in the State of Florida used. (App. 21). The procedures were to be followed uniformly. (App. 21). Therefore, the testing procedure that Mr. Livingston developed and which was used by every analyst for FDLE statewide to test urine samples in Florida should have been subject to the formal promulgation process and the failure to do so violated the administrative procedures act.

The failure to promulgate the procedure to approve these testing procedures is a violation of the administrative procedures act. *DOT v. Blackhawk Quarry*, 528 So.2d 447 (5th DCA 1988), *State v. Reisner*, 584 So.2d 141 (5th DCA 1991), *Dept. of Revenue v. Vanjaria Enterprises*, 675 So.2d 252 (5th DCA 1996).

In *Vanjaria*, the court reviewed an equation to determine tax assessments. *Vanjaria*, Supra. The court held that the procedure to determine the tax assessment constituted a rule and therefore should have been promulgated. *Vanjaria*, Supra. Similarly, the procedure that Mr. Livingston used also constitutes a rule (A rule pursuant to *Blackhawk Quarry* is "an agency statement of general applicability that implements, interprets, or prescribes

laws or policy or describes the organization, procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." *Blackhawk Quarry*, Supra.) and therefore, should have been promulgated. *Vanjaria*, Supra. In accord with the *Vanjaria* decision, FDLE's failure to promulgate the procedure for testing urine samples constitutes an invalid delegation of legislative authority and renders the testing procedure "unapproved".

Finally, in anticipation of the State's previous argument that breath/blood are different from urine and that is why no approved test is required for urine is also contradicted by Florida Statute 322.63.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the petitioner submits that the Florida Supreme Court applied the wrong standard for its constitutional analysis and that by applying the correct legal standard, Florida's implied consent statutes as applied to petitioner Bodden violated his Equal Protection rights because he was not given a "approved" urine test.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

No. SC03-622

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY BODDEN,

Respondent.

[April 15, 2004]

PARIENTE, J.

In *State v. Bodden,* 27 Fla. L. Weekly D2382 (Fla. 2d DCA Oct. 30, 2002), the Second District Court of Appeal certified the following question of great public importance:

> IN ADMINISTERING FLORIDA'S IMPLIED CONSENT LAW, IS THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT REQUIRED TO ADOPT RULES IN ACCORDANCE WITH THE FLORIDA ADMINISTRATIVE PROCEDURES [SIC] ACT GOVERNING THE COLLECTION, PRESERVATION, AND ANALYSIS OF URINE SAMPLES OBTAINED BY LAW ENFORCEMENT PURSUANT TO SECTION 316.1932(1)(a), FLORIDA STATUTES.[1]

Because we conclude that section 316.1932(1)(a)(1), Florida Statutes (2002), does not require that urine testing procedures be promulgated by rule in accordance with the

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[1] We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

Florida Administrative Procedure Act (APA), we answer the certified question in the negative.

FACTS AND PROCEDURAL HISTORY

This case arises out of charges that Bodden was driving under the influence in violation of section 316.193(1), Florida Statutes (2002).[2] During a traffic stop the police officer noticed that Bodden had red eyes and slurred speech, swayed while he stood, and smelled of alcohol. The officer read Bodden the implied consent warning, and Bodden agreed to a breath test and a urine test. The breath test results indicated that Bodden's blood-alcohol level was between .060 and .065 percent. The urine test results indicated the presence of a controlled substance.

Bodden filed two motions in limine requesting that the trial court suppress any reference to his urine test

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[2] Section 316.193(1), Florida Statutes (2002), provides in relevant part:

(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired. . . .

Subsection (2)(a) provides the penalties which apply to a conviction under the section. *See* § 316.193(2)(a).

The police also searched Bodden and found less than twenty grams of marijuana in his pocket, a marijuana pipe, and rolling papers. Consequently, he was also charged with one count of possession of cannabis in violation of section 893.13(6)(b), Florida Statutes (2002), and one count of possession of drug paraphernalia in violation of section 893.147, Florida Statutes (2002). Those charges are not at issue.

results because no regulatory criteria for testing had been promulgated in accordance with chapter 120, Florida Statutes (2002) (the APA). Bodden argued that section 316.1932, part of the implied consent law pertaining to the operation of motor vehicles,[3] requires that any scientific test conducted pursuant to the implied consent law, including a urine test, be an approved test.[4] At the hearing on the motion, the State provided expert testimony regarding the urine testing procedures employed by the Florida Department of Law Enforcement (FDLE) Crime Laboratory in Tallahassee and verified that although FDLE procedures were adapted from published methods, FDLE's specific procedures had not been published or promulgated in accordance with the APA.

The county court judge determined that the implied consent law required that urine testing procedures be promulgated in accordance with the APA, and granted Bodden's motions to suppress. The county judge also certified to the Second District Court of Appeal the same question the Second District subsequently certified to this Court in this case – that is, whether section 316.1932(1)(a)(1) requires that urine testing procedures be approved through formal rule promulgation in accordance with the APA.[5]

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[3] The implied consent law pertaining to operation of motor vehicles encompasses sections 316.1932-.1934, Florida Statutes (2002). *See Mehl v. State*, 632 So.2d 593, 594 (Fla.1993).

[4] At the hearing on the motion Bodden stipulated that he submitted to a urine test and the results were positive for a controlled substance.

[5] Florida Rule of Appellate Procedure 9.030(b)(4)(A)-(B) vests discretionary jurisdiction in the district courts of appeal to review

(Continued on following page)

The Second District answered the question in the affirmative. *See Bodden,* 27 Fla. L. Weekly at D2382. According to the Second District, the sole question to be answered was whether the term "approved" in section 316.1932(1)(a)(1) refers to urine tests as well as breath and blood tests. *See id.* The Second District determined that the implied consent statute was an ambiguous criminal statute, and, as such, should be construed in favor of the accused. *Id.* Interpreting the same statute under similar factual circumstances, the Fifth District Court of Appeal in *State v. Pierre,* 854 So.2d 231 (Fla. 5th DCA 2003), reached a decision contrary to that of the Second District in *Bodden.* In *Pierre,* the Fifth District concluded that section 316.1932, taken as a whole, "evinces an unambiguous intent that urine tests need not be approved." *See id.* at 233. The Fifth District in *Pierre* certified conflict with *Bodden. See id.* at 232.[6]

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certified questions of great public importance from the county courts. Specifically, rule 9.030(b)(4) provides:

> (4) Discretionary Review. District courts of appeal, in their discretion, may review by appeal
>
> (A) final orders of the county court, otherwise appealable to the circuit court under these rules, that the county court has certified to be of great public importance;
>
> (B) non-final orders, otherwise appealable to the circuit court under rule 9.140(c), that the county court has certified to be of great public importance.

Florida Rule of Appellate Procedure 9.160 governs the district courts' discretionary proceedings to review county court decisions.

[6] The appellee in *Pierre* subsequently filed notice to invoke this Court's discretionary jurisdiction based on certified conflict. *See Pierre v. State,* No. SC03-1691 (Fla. notice filed Sept. 22, 2003). We have stayed *Pierre* pending the decision in this case. More recently, the Fourth District adopted the reasoning of *Pierre* and certified conflict with *Bodden. See State v. Montello,* 29 Fla. L. Weekly D597 (Fla. 4th

(Continued on following page)

ANALYSIS

A. Certified Question

The certified question presents the narrow issue of whether section 316.1932 requires that procedures for the collection, preservation, and analysis of urine samples be promulgated and approved by rule in accordance with the APA. As in all cases in which we are called upon to construe a statute, we begin with the language used by the Legislature in the specific statutory provision.

Subsection (1)(a)(1) provides in pertinent part:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit *to an approved chemical test or physical test including,* but not limited to, an infrared light test of his or her breath for the purpose of determining the alcohol content of his or her blood or breath, *and to a urine test* for the purpose of detecting the presence of chemical substances as set forth in s. 877.111 or controlled substances . . . .

(Emphasis supplied.)

The key to the resolution of the narrow issue we confront is whether the word "approved" in section 316.1932(1)(a)(1) modifies "urine test." An "approved" test under this provision is one that is adopted through rule promulgation in accordance with the APA. *See* § 120.54(3),

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DCA Mar. 10, 2004), *notice invoking discretionary jurisdiction filed,* No. SC04-512 (Fla. Mar. 25, 2004).

Fla. Stat. (2003);[7] *see also State v. Bender,* 382 So.2d 697,

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[7] Section 120.54(3) provides in pertinent part:

(3) Adoption procedures. –

(a) Notices. –

1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific. The notice shall include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2), and a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice. The notice must state the procedure for requesting a public hearing on the proposed rule. Except when the intended action is the repeal of a rule, the notice shall include a reference both to the date on which and to the place where the notice of rule development that is required by subsection (2) appeared.

2. The notice shall be published in the Florida Administrative Weekly not less than 28 days prior to the intended action. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

3. The notice shall be mailed to all persons named in the proposed rule and to all persons who, at least 14 days prior to such mailing, have made requests of the agency for advance notice of its proceedings. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed.

4. The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any statement of estimated regulatory costs that has been prepared

(Continued on following page)

699 (Fla. 1980) (recognizing that approved testing methods are those which have been adopted in compliance with the implied consent statutory provisions and the administrative rules). We have recognized that one purpose of establishing uniform, approved testing methods is to "ensure reliable scientific evidence for use in future court proceedings and to protect the health of those persons being tested." *Bender,* 382 So.2d at 699. The results of tests that must be approved "are admissible into evidence [under the implied consent law] only upon compliance with the statutory provisions and the administrative rules enacted by its authority." *Id.* at 699. In this case, if "approved" modifies "urine test" then FDLE must promulgate uniform rules for urine testing in accordance with the APA, which requires a notice and public hearing. To make the determination as to whether "approved" modifies "urine test," we must engage in statutory construction.

We have explained that as a fundamental principle of statutory construction, "legislative intent is the polestar that guides the Court's inquiry." *State v. Rife,* 789 So.2d 288, 292 (Fla. 2001) (quoting *McLaughlin v. State,* 721 So.2d 1170, 1172 (Fla. 1998)); *see also M.W. v. Davis,* 756 So.2d 90, 100 (Fla. 2000) (same). Legislative intent is derived primarily from the language of the statute. *See Rife,* 798 So.2d at 292. Thus, "it is axiomatic that in construing a statute courts must first look at the actual language used in the statute." *Woodham v. Blue Cross & Blue Shield of Florida, Inc.,* 829 So.2d 891, 897 (Fla. 2002); *see also Joshua v. City of Gainesville* 768 So.2d 432,

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pursuant to s. 120.541; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and the notice required by subparagraph 1.

438 (Fla. 2000). Applying that principle of statutory construction, we conclude, contrary to the Second District, that the language of the implied consent law provides that the methods for conducting urine tests are not required to be "approved" through APA rule promulgation.

We begin with the actual language used by the Legislature in section 316.1932(1)(a)(1). As we have explained, "[t]he legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act, but to the manner in which it is punctuated." *Florida State Racing Comm'n v. Bourquardez,* 42 So.2d 87, 88 (Fla. 1949); *see also State v. Hubbard,* 751 So.2d 552, 562 (Fla. 1999) (relying on *Bourquardez* for this principle of statutory construction); *Beach v. Great Western Bank,* 692 So.2d 146, 152 (Fla. 1997) (same), *aff'd sub nom. Beach v. Ocwen Fed. Bank,* 523 U.S. 410 (1998).

The grammatical structure of the first sentence of section 316.1932(1)(a)(1) is such that the implied consent deemed to have been given by an operator of a motor vehicle applies equally to two independent, unrelated tests – the first an "approved chemical test" to determine blood- or breath-alcohol level, and the second a urine test to determine the presence of chemical or controlled substances. The grammatical structure can be illustrated as follows:

> A person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit

> to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath,

and

> to a urine test for the purpose of detecting the presence of chemical substances as set forth in s. 877.111 or controlled substances,

As is illustrated, "approved" directly modifies only "chemical test." It does not modify "urine test." In order to accept Bodden's argument that "approved" modifies "urine test," this Court would be required to insert the word "approved" between "a" and "urine," so that the implied consent created by the statute applies "to *an approved* urine test." This we decline to do. The plain language of this section demonstrates that "approved" does not modify "urine test."[8]

In the alternative, Bodden argues that the Legislature intended for "urine test" to fall within the subset of included approved chemical tests. However, the language of section 316.1932(1)(a)(1) in its entirety "makes a distinction between the two tests in numerous places . . . , evincing that urine tests are not merely subsets of 'chemical tests.' " *Pierre,* 854 So.2d at 233. For example, this section explicitly provides a method for urine testing:

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[8] We recognize that the Legislature drafted section 322.63, Florida Statutes (2002), which contains the implied consent law for commercial vehicles, differently than section 316.1932. However, section 322.63 is not at issue in this case, and we therefore express no opinion on whether urine tests conducted under that statute must be "approved."

> *The urine test* must be incidental to a lawful arrest and administered at a detention facility or any other facility, mobile or otherwise, which is equipped to administer such tests at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of a motor vehicle within this state while under the influence of controlled substances. *The urine test* shall be administered at a detention facility or any other facility, mobile or otherwise, which is equipped to administer such tests in a reasonable manner that will ensure the accuracy of the specimen and maintain the privacy of the individual involved.

§ 316.1932(1)(a)(1). As the Fifth District recognized, if a urine test were intended to fall within the subset of chemical tests subject to rule promulgation through the APA, the language that sets forth explicit procedure for urine tests would be unnecessary. *See id.*

We have stated that words in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words. *See Hechtman v. Nations Title Ins. of New York,* 840 So.2d 993, 996 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage."); *State v. Goode,* 830 So.2d 817, 824 (Fla. 2002) ("[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless."). Applying that principle here, we reject Bodden's alternative construction

and decline to interpret this statute in a way which would render superfluous the separate references to urine tests throughout this section.

Our interpretation that urine tests are distinct from chemical tests is borne out by a review of the remainder of section 316.1932. Although we are initially guided by the clear language of section 316.1932(1)(a)(1), we also look to the other provisions of the implied consent law to discern if there is any indication that the Legislature intended urine testing methods to be "approved." Indeed, in *Mehl v. State,* 632 So.2d 593, 594-95 (Fla. 1993), this Court specifically recognized that provisions of the implied consent law should be read in pari materia as expressing a unified legislative purpose. *See also M.W.,* 756 So.2d at 101 ("[A]ll parts of a statute must be read together in order to achieve a consistent whole.") (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So.2d 452, 455 (Fla. 1992)); *T.R. v. State,* 677 So.2d 270, 271 (Fla. 1996) (all parts of a statute must be read together so that the statute is consistent in its entirety).

Reading section 316.1932(1)(a)(1) in pari materia with the remainder of the implied consent law leads to a logical and harmonious construction in which "approved" does not modify "urine test." The implied consent law as a whole consistently treats tests relating to breath and blood distinctly from urine tests.

For example, section 316.1932(1)(a)(2) confers on FDLE the responsibility for the regulation and approval of

blood and breath testing.[9] Specifically, sections

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[9] Section 316.1932(1)(a)(2) provides:

The Alcohol Testing Program within the Department of Law Enforcement is responsible for the regulation of the operation, inspection, and registration of breath test instruments utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. The program is responsible for the regulation of the individuals who operate, inspect, and instruct on the breath test instruments utilized in the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. The program is further responsible for the regulation of blood analysts who conduct blood testing to be utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327. The program shall:

a. Establish uniform criteria for the issuance of permits to breath test operators, agency inspectors, instructors, blood analysts, and instruments.

b. Have the authority to permit breath test operators, agency inspectors, instructors, blood analysts, and instruments.

c. Have the authority to discipline and suspend, revoke, or renew the permits of breath test operators, agency inspectors, instructors, blood analysts, and instruments.

d. Establish uniform requirements for instruction and curricula for the operation and inspection of approved instruments.

e. *Have the authority to specify one approved curriculum for the operation and inspection of approved instruments.*

f. Establish a procedure for the approval of breath test operator and agency inspector classes.

g. *Have the authority to approve or disapprove breath test instruments and accompanying paraphernalia for use pursuant to the driving and boating under the influence provisions and related provisions located in this chapter* and chapters 322 and 327.

h. With the approval of the executive director of the Department of Law Enforcement, make and enter into contracts and agreements with other agencies, organizations, associations, corporations, individuals, or federal agencies as are necessary, expedient, or incidental to the performance of duties.

(Continued on following page)

316.1932(1)(a)(2)(n) and 316.1932(1)(b)(2) grant FDLE the authority to *approve blood and breath testing techniques and methods,* respectively.[10] Section 316.1932(1)(a)(2)(1)

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i. *Issue final orders which include findings of fact and conclusions of law and which constitute final agency action for the purpose of chapter 120.*

j. Enforce compliance with the provisions of this section through civil or administrative proceedings.

k. Make recommendations concerning any matter within the purview of this section, this chapter, chapter 322, or chapter 327.

l. *Promulgate rules for the administration and implementation of this section, including definitions of terms.*

m. Consult and cooperate with other entities for the purpose of implementing the mandates of this section.

n. *Have the authority to approve the type of blood test utilized under the driving and boating under the influence provisions* and related provisions located in this chapter and chapters 322 and 327.

o. Have the authority to specify techniques and methods for breath alcohol testing and blood testing utilized under the driving and boating under the influence provisions and related provisions located in this chapter and chapters 322 and 327.

p. *Have the authority to approve repair facilities for the approved breath test instruments, including the authority to set criteria for approval.*

Nothing in this section shall be construed to supersede provisions in this chapter and chapters 322 and 327. The specifications in this section are derived from the power and authority previously and currently possessed by the Department of Law Enforcement and are enumerated to conform with the mandates of chapter 99-379, Laws of Florida.

(Emphasis supplied.)

[10] Section 316.1932(1)(b)(2) provides:

An analysis of a person's breath, in order to be considered valid under this section, *must have been performed substantially according to methods approved by the Department of Law*

(Continued on following page)

grants FDLE the authority to "[p]romulgate rules for the administration . . . of [the] section, including definitions," and sections 316.1932(1)(a)(2)(f), (g), and (p) address FDLE's authority to "approve" operators, instruments, and repair facilities relating to *breath and blood testing.* Finally, sections 316.1933(2)(b)[11] and 316.1934(3)[12] both provide that chemical analysis of a person's *blood and breath* must be performed "substantially in accordance with methods approved by [FDLE]." Significantly, there is no mention of urine testing in *any* of these subsections of the implied consent law.[13] As noted by the Fourth District in *Montello,* "[n]owhere in Chapter 316 has the Legislature given FDLE the authority to promulgate rules for urine

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Enforcement. For this purpose, the department may approve satisfactory techniques or methods.

(Emphasis supplied.)

[11] Section 316.1933 addresses the right to use reasonable force when conducting blood tests for impairment or intoxication in case of death or serious bodily injury.

[12] Section 316.1934 addresses testing methods that must be employed in order for the State to benefit from the statutory presumption of impairment.

[13] We also note that the subsequent legislative history of section 316.1932(1)(a)(1) buttresses our conclusion that the Legislature did not intend for "approved" to modify "urine test." *See Lowry v. Parole & Probation Comm'n,* 473 So.2d 1248, 1250 (Fla.1985) ("When . . . an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law. . . . "). During the 2003 legislative session, the Legislature amended section 316.1932 in order to clarify that "approved" was not intended to modify "urine testing." *See* Ch. 2003-54, § 1, Laws of Fla. The chapter law created a new subsection (1)(a)(1)(b), dealing exclusively with urine tests, and removed any reference to urine tests in the context of discussing "approved chemical tests." *See id.*

testing for non-commercial drivers." 29 Fla. L. Weekly at D597.

To construe section 316.1932(1)(a)(1) in the manner urged by Bodden would require the Court to "ignore the remainder of the statute, which, taken in its entirety, clearly conveys a contrary intent." *Pierre,* 854 So.2d at 233; *see also Jones v. ETS of New Orleans, Inc.,* 793 So.2d 912, 914-15 (Fla. 2001) ("A basic tenet of statutory interpretation is that a statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts."). Accordingly, we hold that section 316.1932(1)(a), which requires that blood and breath tests be approved, does not similarly require that urine tests be approved through formal rule promulgation in accordance with the APA.[14]

B. Equal Protection

We next briefly address Bodden's argument that requiring approval for blood and alcohol testing but not for urine testing violates his rights under the equal protection clauses of both the federal and state constitutions. Persons charged with DUI are not a protected or suspect class under the equal protection clauses. *See Graham v. Ramani,* 383 So.2d 634, 635 (Fla. 1980) (holding that suspect classes are those based on alienage, nationality, or race).

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[14] The test results may be admitted into evidence during trial so long as the State lays the proper common law predicate set forth in *Bender,* which includes a determination that the testing methods utilized are reliable. *See Robertson v. State,* 604 So.2d 783, 789 (Fla. 1992) (holding that when State fails to comply with administrative rules and statutory provisions governing approved testing methods, test results are admissible if State lays the common law predicate).

In the absence of a suspect classification, equal protection demands only that a classification that results in unequal treatment bear some rational relationship to a legitimate state purpose. *See Duncan v. Moore,* 754 So.2d 708, 712 (Fla. 2000). Therefore, the State may treat those charged with DUI based on blood and breath evidence of alcohol differently from those charged because of urine test results, so long as there is a rational basis for doing so.

In this regard, we note that the goals of the breath and blood tests are different from the goals of urine testing. Breath and blood tests detect alcohol content, whereas urine tests detect controlled substances. *See* § 316.1932(1)(a)(1). If an individual has a certain level of alcohol in his or her system, the State benefits from the presumption of impairment. *See* § 316.1934. However, because there is no "legal limit" for controlled substances, there is no similar presumption associated with urine test results. A person is guilty of DUI only if the State proves that the controlled substance impaired the person's normal faculties.

We note that the testimony of the FDLE expert in this case further demonstrates the specific purpose and distinct nature of the urine test. According to the expert, unlike a breath or blood test which determines alcohol content, a level of impairment cannot be extrapolated from a drug concentration detected in a urine sample. In other words, it would be very difficult to conclude that a person was under the influence of a particular drug to the point that his or her normal faculties were impaired at the time of his or her arrest based solely on the presence of the drug in the person's urine.

Moreover, as even the Second District noted in *Bodden,* "the methodology for administering a urine test should be somewhat less complex than the methodology necessary for administering a breath or blood test." 27 Fla. L. Weekly at D2384. The Fifth District similarly stated in *Pierre* that "[t]he legislature apparently concluded that its own basic guidelines were sufficient for this rather simple test, but that more comprehensive procedures should be developed for blood testing, which is more intrusive, and breath testing, which is more complex, than urine testing." 854 So.2d at 233. Based on these distinctions, we conclude that a rational basis exists for treating the procedures for administering urine tests differently from the procedures for administering breath and blood tests and therefore reject Bodden's argument that the statute violates equal protection.

CONCLUSION

In conclusion, we hold that the implied consent law for operators of motor vehicles does not require that urine testing methods be approved in accordance with the APA. We emphasize that we do not decide whether it would be preferable for urine tests to be approved through rule promulgation. Rather, we resolve this case by applying well-established principles of statutory construction to effectuate the legislative intent of the statute. *See Hawkins v. Ford Motor Co.,* 748 So.2d 993, 1000 (Fla. 1999). Accordingly, we approve the Fourth and Fifth Districts' reasoning in *Montello* and *Pierre,* answer the certified question in *Bodden* in the negative, and quash the Second

District's decision below. We remand this case for proceedings consistent with this opinion.

It is so ordered.

ANSTEAD, C.J., and WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Certified Great Public Importance

Second District – Case No. 2D01-3535

(Hillsborough County)

Charles J. Crist, Jr., Attorney General, Robert J. Krauss, Chief-Assistant Attorney General, Bureau Chief, Tampa Criminal Appeals, and Jenny Scavino Sieg, Assistant Attorney General, Tampa, Florida,

for Petitioner

Eilam Isaak, Tampa, Florida,

for Respondent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA, Appellant,	)	
v.	)	CASE NO. 2D01-3535
ANTHONY T. BODDEN, Appellee.	)	

Opinion filed October 30, 2002.

Appeal from nonfinal order of the County Court for Hillsborough County; Christine K. Vogel, Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Jenny Scavino Sieg, Assistant Attorney General, Tampa, for Appellant.

Eilam Isaak, Tampa, for Appellee.

GREEN, Judge.

The State appeals the order in limine of the county court that barred the State from using as evidence, in the trial of a driving under the influence (DUI) case, the results of Anthony T. Bodden's urine test, which was administered pursuant to the implied consent law. *See* § 316.1932(1)(a), Fla. Stat. (2000). In the order, the county judge certified to this court the following question of great

public importance pursuant to Florida Rule of Appellate Procedure 9.160.

> IN ADMINISTERING FLORIDA'S IMPLIED CONSENT LAW, IS THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT REQUIRED TO ADOPT RULES IN ACCORDANCE WITH THE FLORIDA ADMINISTRATIVE PROCEDURES ACT GOVERNING THE COLLECTION, PRESERVATION, AND ANALYSIS OF URINE SAMPLES OBTAINED BY LAW ENFORCEMENT PURSUANT TO SECTION 316.1932(1)(a), FLORIDA STATUTES?

We answer the question in the affirmative.

On August 7, 2000, pursuant to section 316.193, Florida Statutes (2000), police issued Mr. Bodden a traffic citation for driving under the influence. Pursuant to section 316.1932 (1)(a), Mr. Bodden submitted to a test to determine the alcohol content of his blood. Mr. Bodden's blood alcohol level was .060 and .065. Mr. Bodden also submitted to a urine test, the results of which were positive for a controlled substance. The State charged him with one count of possession of cannabis and one count of possession of drug paraphernalia, as well as with the DUI charge.

Mr. Bodden filed motions in limine in which he requested the court to forbid any reference at trial to his urine laboratory test results because no regulatory criteria had been promulgated to insure the reliability of the testing procedure. At the hearing on the motions, Mr. Bodden stipulated that he submitted to a urine test and the results were positive for a controlled substance. The State stipulated that if its expert, Marcia Barnhart (a witness in the instant case), had testified about the

procedures used in Florida to test urine for the presence of controlled or chemical substances, her testimony would be the same as the deposition testimony of Dale Livingston, which testimony was taken in a different case. Dale Livingston's deposition is part of the record on appeal.

Mr. Livingston testified in his deposition that as senior analyst for the Florida Department of Law Enforcement (FDLE) laboratory in Tallahassee, it is his responsibility to maintain a methods manual for the purpose of the laboratory testing of urine. He testified that this procedure has not been published in the Administrative Law Weekly or promulgated in accordance with the Administrative Procedures Act because there is no requirement that it be done. He further testified that, as far as he is aware, his laboratory procedures are different from the procedures used by other laboratories and that he believes his procedures produce superior results.

The sole issue in this appeal is the interpretation of section 316.1932(1)(a)(1), which states:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an *approved* chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath, and to a urine test for the purpose of detecting the presence of chemical substances as set forth in s. 877.111 or controlled substances, if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence

> of alcoholic beverages, chemical substances, or controlled substances.

(Emphasis added.)

The term "approved" applies to a standard rule promulgated under the Administrative Procedures Act. *See* § 120.50, Fla. Stat. (2000). The State argues that only a test to determine the alcoholic content of a person's blood or breath has to be approved and not a urine test to determine the presence of chemical or controlled substances.

When a criminal statute is ambiguous and capable of different constructions, it should be construed in favor of an accused. *See* § 775.021(1), Fla. Stat. (2000); *Cabal v. State*, 678 So. 2d 315 (Fla. 1996). With this in mind, we hold that the phrase "approved chemical test or physical test including, but not limited to" in section 316.1932(1)(a)(1) applies to "a urine test for the purpose of detecting the presence of chemical substances . . . or controlled substances.

The State refers to section 316.1932 (1)(b)(2), Florida Statutes (2000), which provides that for an analysis of a person's breath to be considered valid under section 316.1932, it "must have been performed substantially according to methods approved by the Department of Law Enforcement. For this purpose, the department may approve satisfactory techniques or methods." The State notes that there is no such language in section 316.1932 regarding the validity of a urine test. Section 316.1932 (1)(f)(1) states that the FDLE shall adopt rules specifying the methodology to be used in administering breath or blood tests to determine the alcohol content of the blood. Section 316.1932 does not require that the FDLE adopt rules in regard to the administering of urine tests.

The FDLE has adopted rules implementing the implied consent law in chapter 11-D, Florida Administrative Code. Section 11D-8.003 is entitled "Approval of Breath Test Methods and Instruments." Chapter 11D contains no procedure for testing urine specimens. In *Southwest Florida Water Management District v. Charlotte County*, 774 So. 2d 903 (Fla. 2d DCA 2001), we noted "that a 'statutory phrase should also be viewed not only in its internal context within the section, but in harmony with interlocking statutes.'" 774 So. 2d at 916 (quoting *WFTV, Inc. v. Wilken*, 675 So. 2d 674, 679 (Fla. 4th DCA 1996)). Thus, in this instance, in reading section 316.1932 (1)(a)(1) in conjunction with sections 316.1932(1)(b)(2) and 316.1932(1)(f)(1), we conclude that an "approved" urine test is one in which the method of administration and the analysis of the test are "performed substantially according to methods approved by" the FDLE. We acknowledge, however, that the methodology for administering a urine test should be somewhat less complex than the methodology necessary for administering a breath or blood test.

We hold also that a urine test taken pursuant to the implied consent law, which is not an approved test, is not admissible as a scientific test pursuant to the traditional rules regarding the admissibility of evidence since consent was not voluntarily given. *See State v. Polak*, 598 So. 2d 150, 153-54 (Fla. 1st DCA 1992) (holding that where breath tests given were not approved tests, the defendants' consent "was based on misinformation, namely, that their licenses would be suspended for failure to submit to an approved test, [and] the defendants' consent cannot be deemed voluntary pursuant to" the rule enunciated in *State v. Burnett*, 536 So. 2d 375 (Fla. 2d DCA 1988)).

We therefore affirm the trial judge's order in limine and remand for further proceedings.

PARKER and CASANUEVA, JJ., Concur.

Supreme Court of Florida

TUESDAY, JULY 6, 2004

CASE NO.: SC03-622
Lower Tribunal No.: 2D01-3535

STATE OF FLORIDA vs. ANTHONY T. BODDEN

Petitioner(s) Respondent(s)

Respondent's Motion for Rehearing is hereby denied.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall [SEAL]
Clerk, Supreme Court

tc:
Served:

JENNY SCAVINO SIEG
ROBERT J. KRAUSS
EILAM ISAAK
HON. JAMES BIRKHOLD, CLERK
HON. CHRISTINE K. VOGEL, JUDGE
HON. RICHARD L. AKE, CLERK